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NO. 91-1236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LYNNE ABRAHAM,
Petitioner
v.

MARTIN HARRIS, et al.,
Respondents

Reply Brief to Respondents' Brief in Opposition to Petition for Certiorari

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents imply that the Philadelphia prison conditions are unconstitutional. On the contrary, there has never been pre-trial discovery, a trial, or any findings or concessions of unconstitutionality in this litigation. In the related state court litigation, the findings of unconstitutionality were invalidated by the

Pennsylvania Supreme Court. See Jackson v. Hendrick, 503 A.2d 400 (Pa. 1986).

SUPPLEMENTAL ARGUMENT

I. PETITIONER FULLY AND FAIRLY PRESENTED IN THE LOWER COURTS THE ARGUMENTS RAISED IN THE CERTIORARI PETITION.

Respondents claim that petitioner waived the first argument in her certiorari petition because she allegedly did not raise it in the Third Circuit Court of Appeals. Respondents contend that petitioner failed to argue below that Pennsylvania had the right to designate the District Attorney to represent the Commonwealth's interests. Respondents specifically assert that petitioner failed to "characterize" the state statute in this manner,[1] and that the Third Circuit thus did not address this issue. On the

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[1]Brief of Respondents in Opposition to Petition for Writ of Certiorari at i.

contrary, petitioner squarely presented this argument in the lower court.

Respondents' argument essentially boils down to a quibble over whether one must use the identical words in the court below. Specifically, respondents complain that petitioner used the word "grant" rather than the words "delegate" or "designate" to describe Pennsylvania's actions in conferring an interest on the District Attorney. Here, petitioner's argument that the state granted a public official the right to compel institutional custody of prisoners necessarily presumes that the state had the power to grant this right in the first place.

When the District Attorney originally sought to intervene in this case, none of the parties contested, and the Third Circuit held, that under Pennsylvania law the District Attorney was responsible for representing the Commonwealth's interest

in the enforcement of its criminal laws.[2] The Third Circuit nonetheless denied intervention, holding that "[w]e must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials. But we decline to equate the District Attorney's function as the spokesperson for Pennsylvania's interest in criminal prosecutions with the responsibility for policing the entire criminal justice system."[3] Following the enactment of 18 Pa. Cons. Stat. Ann. § 1108, the District Attorney again sought to intervene on the basis that the Pennsylvania Legislature had now made it clear that the District Attorney's powers did indeed

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[2]See Harris v. Pernsley, 820 F.2d 590, 598 (3d Cir. 1987) (recognizing that the District Attorney has the power and the duty "to represent the Commonwealth's interests in the enforcement of its criminal laws") (quoting Commonwealth ex rel. Specter v. Bauer, 261 A.2d 573, 575 (Pa. 1970)).

[3]Harris v. Pernsley, 820 F.2d at 602.

include participation in prison litigation, and thus established an interest sufficient for intervention.

Following the denial of the second motion to intervene, petitioner appealed to the Third Circuit. In her brief, petitioner again contended, as in the District Court, that the Pennsylvania Legislature had granted the District Attorney an interest sufficient for intervention.[4] Petitioner maintained that the District Attorney had the duty under Pennsylvania law "to represent the Commonwealth's interests in enforcing criminal laws,"[5] and that pursuant to the enactment of § 1108 the District Attorney was the only public

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[4]See Third Circuit Brief for Appellant, Supp. App. at 13 ("The Pennsylvania Legislature clearly and emphatically granted the District Attorney state law rights and a legal interest directly relating to this prison litigation"); Supp. App. at 17 ("[T]he District Attorney has been granted substantial state law rights by the Commonwealth of Pennsylvania").

[5]See Supp. App. at 15.

official designated by the state to compel institutional custody of prisoners.[6] Petitioner further argued that the federal courts were bound to "respect the boundaries that the Commonwealth has chosen to draw for its public officials,"[7] and that "the Commonwealth has chosen to include within those boundaries for the District Attorney the right to seek to compel institutional custody of prisoners."[8]

Based upon these arguments, petitioner did not waive in the lower court the issue now presented to this Court. The argument that the state had the power to designate the District Attorney as the public

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[6] See Supp. App. at 21-22 ("The District Attorney is the only official granted the right to seek to compel institutional custody of county prisoners. A Pennsylvania court has determined that pursuant to § 1108 a District Attorney is entitled to compel government officials to provide custodial facilities.").

[7] See Supp. App. at 22 (quoting opinion in Harris v. Pernsley, 820 F.2d at 602).

[8] See Supp. App. at 22.

official to compel institutional custody of prisoners necessarily presumes that the state had the power to delegate this function in the first place.

Simply because the certiorari petition now uses language not employed in presenting the argument below, does not mean that the argument has been waived. A petitioner is not required to file a certiorari petition that is a verbatim recitation of the appellate brief filed in the court of appeals. On the contrary, the practice and procedure of this Court necessarily requires that the certiorari petition have a special focus; the petition must demonstrate cert worthiness by advising this Court that a conflict exists with another appellate court, that the question presented is sufficiently important for Supreme Court review, or that the decision below calls for the exercise of this

Court's supervisory powers.[9] These certiorari considerations are necessarily not appropriate for an appellate brief in the court of appeals.

The record establishes that the issues presented in the certiorari petition were fully and fairly presented in the Court of Appeals. The Third Circuit's opinion, and the dissenting opinion of Judge Aldisert, squarely address the issue of whether Pennsylvania had the right designate the District Attorney as the public official to challenge the consent decrees in this prison litigation. This Court should therefore grant review.

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[9] See generally Stern, Gressman, and Shapiro, Supreme Court Practice (6th Ed. 1986), § 6.31.

II. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY WHERE THERE HAS BEEN A CLEAR-CUT STATUTORY CHANGE IN STATE LAW.

Respondents also claim that the law of the case doctrine precludes granting relief to petitioner and that this case is therefore inappropriate for review. This claim is meritless.

In the Third Circuit's original opinion, that court denied the District Attorney the right to intervene based upon its interpretation of Pennsylvania law concerning the duties of the District Attorney.[10] Subsequent to this decision, the Pennsylvania Legislature chose to delegate to the District Attorney the right to participate in prison litigation and compel the institutional custody of prisoners.

The state law upon which the Third Circuit relied thus changed dramatically upon the enactment of § 1108. Because

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[10] See Harris v. Pernsley, 820 F.2d at 597.

there has been a supervening change of law, the law of the case doctrine should not be applied. See Schultz v. Onan Corp., 737 F.2d 339, 345 (3d Cir. 1984); Amen v. City of Dearborn, 718 F.2d 789, 794 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984); Shannon v. United States Department of Housing and Urban Development, 433 F. Supp. 249, 251 (E.D. Pa. 1977); see Ratay v. Lincoln National Life Insurance Co., 405 F.2d 286, 288 (3d Cir. 1968). See generally Arizona v. California, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 1391 n.8 (1983) ("law of the case" should not be applied where it is clearly erroneous and would work a manifest injustice); Quern v. Jordan, 440 U.S. 332, 347 n.18, 99 S. Ct. 1139, 1148 n.18 (1979) ("law of the case" does not apply to issues not previously determined).

III. THE THIRD CIRCUIT'S NEW INTERVENTION STANDARD WARRANTS REVIEW.

Respondents do not contest that the Third Circuit's opinion required a proposed intervenor to establish that she could have been a party to the underlying litigation. Rather, respondents contend that because the opinion did not expressly adopt a new standard for intervention, Supreme Court review is unwarranted. This argument is meritless.

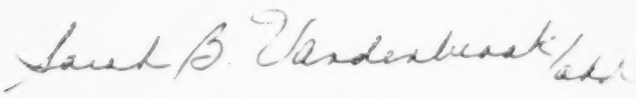
Where, as here, the court uses new standards to analyze an intervention motion, the court necessarily is adopting those standards as the test for intervention. The fact that it does not expressly label this new standard as such does not mean that it does not exist. Here, the Third Circuit has clearly required a proposed intervenor to establish that she could have been a party to the underlying litigation. This requirement is contrary

to this Court's authority, Fed. R. Civ. P. 24, and the cases from other appellate courts. This Court should for this additional reason grant review.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, this Court should issue a writ of certiorari to review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,



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